Supreme Court, U.S.
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NO._____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

ERNESTO C. CASTANEDA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition For Writ Of Certiorari To The United States Court of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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58 pp

QUESTIONS PRESENTED

1. Do such conflicts exist among circuits as regards law of the case here involved as to merit this Court's exercise of supervisory powers for uniformity's sake? Also, has the Fifth Circuit contradicted its prior holdings in case at bar so as to merit this Courts attention?

2. Is Rule 46 (e), Federal Rules of Criminal Procedure, unconstitutional for failure to provide for notice and hearing to sureties, as required by Due Process of Law provisions of the Fifth Amendment?

3. Is Certiorari merited by fact that an important legal matter never decided in a contest by a surety, but only in one case by a principal, is stated at "2" above?

4. Does a ghostwriter's admission of her own ineffective assistance in the Fifth Circuit due to violation of her own constitutional rightrs by ineffective assistance given her so impact on surety's rights, due to core liberty interests involved, as to deny surety's Sixth Amendment rights? Is this constitutional issue proper further, due to another test often required in granting certiorari, that being current newsworthy interest in the subject matter affecting large numbers of people, and particularly, present hearings of the tobacco industry and how it has all impacted on surety, a non smoker?

5. Do sureties have sufficient liberty and property interests and perhaps, "core" liberty interests involved, a scenario confronting multitudes of bondsmen nationwide with strict liability in situations

of impossibility of performance; whereby the Court could deem "special and important reasons of general public concern" involved, so as to grant certiorari?

6. Is forfeiture of an amount large enough to end a business due to strict liability and impossibility of performance so shocking to the conscience as to merit this Court's granting certiorari; especially due to fact no case was located in recorded law where so many mitigating factors existed and so few exacerbating factors existed where the penalty was so harsh as in the case at bar?

7. Is present newsworthiness, a standard sometimes used to grant Certiorari, involved in this case due to Principal's apparent kidnapping and/or murder?

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Petitioner Ernesto C. Castaneda, praying that Writ of Certiorari be issued to review the judgement and opinion in the United States Court of Appeals for the Fifth Circuit issued on January 3, 1996, files this Petition for writ of Certiorari, saying more particularly in support:

OPINIONS AND JUDGEMENTS ISSUED IN THE COURTS BELOW

On January 3, 1996 the United States Court of Appeals for the Fifth Circuit rendered its opinion affirming the judgement in the case styled *UNITED STATES OF AMERICA, v. ROBERT LOPEZ*, No. 94-60475. A copy of that opinion is attached hereto as Appendix A.. A copy of the *JUDGEMENT OF DEFAULT* from the United States District Court for the Southern District of Texas is attached hereto as APPENDIX B.

CITATIONS OF OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS AND ORDERS ENTERED IN THE CASE BY COURTS OR ADMINISTRATIVE AGENCIES INVOLVED

Smalldone v. U.S., 211 F.2d 161, (10th Cir. 1954)

United States v. Roher, 706 F.2d 725 (5th Cir. 1983)

United States v. Skipper, 633 F.2d 1177 (5th Cir. 1981)

United States v. Terrell, 983 F.2d 653 (5th Cir. 1983)

JURISDICTION

Date of Judgment Sought to be Reviewed: September 18, 1995

Date of Order Regarding Rehearing: January 11, 1996

Date and Terms of Orders Granting Extensions of Time: In Appendix

Statutory provisions conferring jurisdiction on this Court to review on Writ of Certiorari: Title 28 U.S.C.A. 2101, Supreme Court Rule 10.1

Statement that notifications required by Rule 29.4(b) or (c) have been made. As per Certificate of Service, attached.

Constitutional Provisions, Treaties, Statutes, Ordinances and Regulations Involved in Case:

This case involves a direct conflict between various courts decisions in the interpretation and the application of the First, Fifth and Sixth Amendment to the United States Constitution.

Federal Rule of Criminal Procedure 46(e), 18 U.S.C.A.

F.R.A.P. 3 is basis for conferring jurisdiction in the first instance and the trial court had jurisdiction of a federal bond.

STATEMENT OF THE CASE

Petitioners were agent at large and surety on the bond of principal, Roberto Lopez, issued in amount of $100,000.00 (Appendix A, attached.) Petitioner was never notified of time of jury selection, as evidenced by the Court's notice only to attorneys and principal, (Appendix B). From all reports, principal was kidnapped by men transporting him to court, and later reports were that he had been killed or died. Petitioner exerted great effort in locating principal, including, but not limited to conferring with his known friends and family in the area and in Mexico and publishing wanted poster, including photographs in areas where he might be, (Appendix C, attached). Also, bounty hunters were dispatched to locate Roberto Lopez, but they returned with news that he had been kidnapped and was deceased, as evidenced by relatives affidavits, attached, (Appendix D). No death certificate was ever located, however, this is common in some rural areas of Mexico. Surety contacted law enforcement on both sides of Border.

The District Court ordered forfeiture in amount of $100,000.00. Petitioner duly appealed to the United States Court of Appeals for the Fifth Circuit. (Appendix E, attached). Petitioner was wholly unrepresented in the trial court and had ineffective assistance in the Fifth Circuit and this last chance is Petitioner's first time to have his day in court. The Fifth Circuit granted extensions of time, but Opinion was ultimately entered affirming the trial court. (Appendixes F and G). Petitioner made motions for rehearing and to stay mandate, but they were not considered or denied, (Appendix H and I). This Petition is timely, within 90 days of denial of motion for rehearing and to stay mandate.

REASONS FOR GRANTING PETITION

In the Tenth Circuit case, *Smalldone v. U.S.*, 211 F.2d 161, impossibility of a principal's presence in court was similar to that situation in case at bar. *Smalldone* being hospitalized for emergency surgery, and principal here, Roberto Lopez, being kidnapped and/or killed, judging from all reports. However, in its opinion in the case at bar, the Fifth Circuit Court of Appeals held that Smalldone's surgery was less willful that Roberto Lopez's kidnapping and/or death, giving no reason how this could be. Petitioner suggests that one event is as non volitional as the other and asks the Court to reconsider this incongruity, because Petitioner fails to see any distinguishing factor.

Further, the Court distinguished *Smalldone*, *supra*, from the case at bar, holding that Smalldone's need for medication was established by reliable evidence. Smalldone was fortunate in this regard with event precipitating his failure to appear occurring the a location maintaining regularly kept business records. However, our own life experiences, as well as legal history, dictate that most significant events do not occur amidst witnesses and places keeping such records, unless we become so paranoic we take witnesses with us to every event of life, "just in case".

Petitioner seeks the Court's indulgence in the fact that most significant events occurred in another country, where laws are different, people distrustful of Americans and communications difficult. Petitioner submits that within the totality of circumstances, Roberto Lopez's situation was: (1) no more willful than *Smalldone's*, (2) Petitioner's evidence is as reliable as that which could be obtained under the circumstances.

U.S. v. Roher, 706 F.2d 725, held that though death of a principal was a relevant factor, other factors can outweigh it; however, there was not such a time lag in notification of death after forfeiture as in *Roher*, *supra*, where an increment of ten months elapsed, but news of death in case at bar appears resultant of kidnapping, substantiated as having occurred in route to court by those transporting Roberto Lopez.

No case was located where as many mitigating circumstances existed as in case at bar and where so few exacerbating circumstances existed as in case at bar, where a forfeiture failed to be set aside, or at least remission made.

In *U.S. v. Parr*, 594 F.2d 440 (5th Circuit - 1979), it was held that a bond forfeiture ought to bear some reasonable relation to cost and inconvenience to the government in regaining custody and amount of delay and stage of proceedings at time of forfeiture. Also, willfulness of breach, prejudice suffered by the government in regaining and public interest and necessity of obtaining appearance of the defendant are involved.

In the *Parr* case, it was held that a bond forfeiture should be at least set aside to the point of remission and that failure to remit was abuse of discretion, even though Parr's failure to appear was willful due to suicide. In the Parr case, the government presented no evidence showing expense it had incurred due to breach, just as in the case at bar; so if forfeiture in the Parr case was set aside, and remission made, such should certainly be done in case at bar, since being kidnapped and being killed or dying are not willful, as is a suicide, where surety was nonetheless, exonerated.

Another test of *Parr*, and similar line of cases, is also met in the case at bar. In the instant case, the stage of

proceedings was early. Roberto Lopez failed to appear for jury selection, while *Parr* failed to appear for sentencing.

Granted, jury panel had to wait some time, but compared to huge expense and effort already involved in trying Parr, inconvenience and expense are minimal. Nor, was the government so prejudiced thereby in case at bar, inasmuch as Roberto Lopez was still presumed innocent, while Parr had been convicted, his forfeiture making a mockery of the judicial process. In fact, Lopez's forfeiture just gave the government more "grist for its mill" prior to trial, total opposite of the government being prejudiced.

Little, if any, public policy is affected by Roberto Lopez's breach. There are an abundance of drug cases all over and the Rio Grande Valley of Texas is inundated with them and Lopez's case is nothing but just one more; while the *Parr* case represented long time official corruption of a tyrannical county, taking over other people's lives all over, no one immune from tyrants using them against their will, though citizens are free to reject drugs. Many important Bill of Rights provisions were denied citizens in the *Parr* matter.

Above, Petitioner shows three reasons, additionally to the fact that in neither case did government present evidence of expense, why if remittitur were allowed in *Parr*, it should certainly be allowed in the case at bar:

1. Suicide is volitional, while kidnapping and dying are not.

2. Little expense and trouble had yet become involved due to early stage of proceedings.

3. Lopez is just one of many such cases, while *Parr* was an anomaly having pervasive and long lasting repercussions.

Petitioner suggests the Fifth Circuit has entered an Opinion contrary to its prior holding in the case at bar, which is the kind of important matter that needs be resolved by the Court.

In *U.S. v. Frias-Ramirez*, 670 F.2d 849, (9th Cir. - 1982), we find similar circumstances of the death of a principal. Forfeiture was not set aside largely, due to no evidence establishing that the principal was aboard a vessel involved when it burned. Rule 46(3) (1-4), 18 U.S.C.A.. In the instant case, evidence existed that Lopez was being transported to court by men who allegedly kidnapped him and killed him, at least putting him at the place of non willful act causing breach. Moreover, in the case at bar, relatives' statements were had that Lopez was deceased in a foreign country where death records are kept in a slipshod manner, if at all in some circumstances, though a body was never found in *Frias-Ramirez* as here, judging from evidence confirming death. In *Frias*, (supra), surety's made the admission that they lacked evidence also, which was held against them, while in instant case there is no such admission, but a hotly contested matter, where this evidence does not exist, but evidence of Lopez's kidnapping and/or death does exist.

There is some authority for the death of a principal per se exonerating. Such was the case in *U.S. v. Costello*, 47 F.2d 684, (6th Cir. 1931), still good law; though in *Costello*, (supra), no facts substantiated his death, which is not true in the instant case.

In *U.S. v. Foster*, 417 F.2d 1254 (7th Cir.), the face amount of the bond and any justifications for setting the amount aside, as well as degree of blatancy or extenuating circumstances were held to all be considerations in matter of setting aside forfeiture and in remission. In that case, the principal travelled from Illinois, during jury deliberations, to Mexico, and was arrested upon re entry in California while transporting narcotics. He was also serving a sentence and had outstanding fines then, estimated at $5,000.00. He delayed conclusion of trial at a stage where government had already exerted much trouble and expense and he caused government to incur much more extra and avoidable trouble and expense, additionally to that of new offense involved. Simply none of these factors were involved in the case at bar and Petitioner meets tests required of him to set aside forfeiture or at least to remit, if Foster did. In the *Foster* case, (supra), the $25,000 forfeiture was set aside, pursuant to Rule 46 (f), (1-4), even under such onerous circumstances. Yet the Fifth Circuit has held in case at bar $100,000.00 bond forfeiture insufficient, which is inordinate and incongruous with known law.

There appears to be a conflict between the Fifth, Sixth, Seventh, Ninth and Tenth circuits and the Fifth Circuit seems to have contradicted its own prior decisions. Such would merit granting Certiorari in order for this Court to reconcile conflicts among circuits for uniformity throughout the United States.

Both *U.S. v. Minor*, 846 F.2d 1184, (9th Cir. 1988) and *Frias-Ramirez*, (supra), dictate tests for setting aside a forfeiture, from them, the courts having to consider willfulness of a defendant's breach, explanation or mitigating circumstances, whether sureties were professionals or just relatives or friends, the participation of sureties in apprehending principal, (which was extensive by Petitioner

in instant case, evidence shows), appropriateness of bond amount, shown inappropriate in the *Parr* case comparison, and cost and inconvenience and prejudice to the government, Rule 46(e) (2), 18 U.S.C.A.

Petitioner simply does not believe these tests, and those set out below, were adequately considered by the trial court and on appeal, and that arbitrary and capricious action was taken against Petitioner in not following existing law.

"Special and important reasons of general public concern", meriting the Court's attention exist in the foregoing scenario, due to large number of bondsmen affected throughout the country by situations involving impossibility where they still face strict liability.

Foreign relations, treaties, reciprocity and comity involved also merit the Court's attention.

Also meriting the Court's attention is lack of notice to Petitioner of setting of hearing to select the jury, evidence of record showing "c.c.'s" on the clerk's notice form only to attorney of record, A.U.S.A., and principal, not to Petitioner. This is a possible Due Process violation, and constitutionality of Rule 46(e), 18 U.S.C.A. is questioned, also a proper matter for this Court to take up on certiorari. Nowhere in all the case law did Petitioner locate a contest of this rule for lack of Due Process' Notice and hearing requirements as regards a surety, but only in one case regarding a principal; and such constitutes an important matter that has not been decided but should be, another proper office of certiorari.

Additional reasons other than kidnapping and death of Principal exist for this Court's setting aside forfeiture in case at bar and are addressed below.

I.

PRE FORFEITURE EXONERATION TESTS

In the Ninth Circuit case, *U.S. v. Vaccaro*, (supra), it was held:

> "The fact that the Bail Reform Act limits sanctions to serious breach for non appearance does not preclude imposition under criminal procedure rules of other penalties such as forfeiture for breach of *other* release conditions." 18 U.S.C.A. 3148(a), F.R.Cr.P. 46(c)

There were no such "other" release conditions breached in the instant case, as was significant in *Vaccaro*, (supra), due to commission of other offenses. Thus, it would appear to follow from the holding that Bail Reform Act provisions should have limited liability here.

Nor, is Petitioner responsible for breach of conditions imposed by the Court without notice, according to *U.S. v. LePicard*, 723 F.2d 663, (9th Cir. 1984). Arguably, such situation is presented in case at bar for reasons that combined N.C.I.C., T.C.I.C. failure to list principal allowed his walking a warrant and records showed such defect and were within the government's knowledge.

But in *U.S. v. Miller*, 539 F.2d 445, (5th Cir. 1976), terms of the bail contract itself, were to be construed strictly in favor of the surety and it is apparent from the Opinion's strict liability holding that the Fifth Circuit has contradicted itself, again requiring this Court's supervisory power for uniformity's sake.

Another test removing Petitioner from strict liability involves contract law's requirement of exoneration in case of

unilateral mistake by one party when the other party knew of or had reason to know of a mistake, according to *Libby, McNeil and Libby v. United Steelworker*, 809 F.2d 1432 (9th. Cir. 1987), and *Restatement of the Law of Contracts*, F.2d, section 153 (1981); with *U.S. v. Figuerola*, 58 F.3d 504, (9th Cir. 1995) further holding that a bond is, in fact, a contract governed by general contract law principles. Also, *U.S. v. Toro*, 981 F.2d 1045, (9th Cir. 1992).

Such a situation exists in the case at bar, Petitioner relying on N.C.I.C.'s proper listing of Principal's status, such that he count not walk warrants; however, Principal was released from Starr County Jail and Petitioner forced to the impossibility of locating him or forfeiting due to failure of N.C.I.C. to establish a "hold" or al least bondable charge, the government in pari delicto.

Bond is to be construed in favor of sureties in any event. *U.S. v. Miller*, (supra).

Ignorance of the law is another test for exoneration prior to forfeiture, as established by *Minor*, (supra). Obviously, Petitioner was ignorant to extent required by test prior to forfeiture, unaware of future NC.I.C. breach possibilities and after forfeiture, going clear through the Fifth Circuit proceedings, believing impossibility of performance would exonerate and reiterating here that impossibility should so exonerate. Petitioner is not an attorney and reason for expertise in briefs is presence of a ghostwriter with 22 years experience, and Petitioner can only be held to laymen's standards, not attorney's standards.

A final test for exoneration in pre forfeiture matters before turning to contract itself and locating exonerating deficiencies, consists of failure to provide required information to sureties and failure to inform sureties of risks,

further tests drawn from *Minor*, (supra). Certainly, sureties were not advised of N.C.I.C. failure or of impossibility of performance's failure to mitigate, but Petitioner was also not advised of other factors set out herein.

II.

POST FORFEITURE EXONERATION TESTS

Whether government is prejudiced or damaged is relevant to both exoneration and mitigation of whole or partial remittitur; Petitioner further, pleading alternatively all factors argued here as exoneration be also considered for remission. Further, when more than just general allegations are involved and when the surety lacks counsel, hearing is required. Nor can a surety be held to any greater obligation than he has agreed to and when forms contained deficiencies, as here, that is a test for post forfeiture exoneration. Another test is whether at least minimal fairness exists to sureties who undertake heavy financial responsibilities without sufficient understanding. Though the Ninth Circuit would make exception for professionals vis a vis often, friends and relatives who serve as sureties, Petitioner does not have the legal expertise as might appear from this pro se brief written by a ghostwriter and should be exonerated according to laymen's standards. Petitioner also reiterates unilateral mistake as equally cogent post forfeiture exoneration test, as pre forfeiture exoneration.

Authority for the foregoing tests is the following:

U.S. v. Roher, 706 F.2d 725 poses the question of whether the government was damaged. *Roher* also requires hearing when more than just general subjects are to be addressed. *U.S. v. Minor*, 846 F.2d 1184, (9th Cir. 1988), requires such hearing when not represented by counsel.

Deficiencies in form are also addressed in *Minor*, (supra). *U.S. v. Miller*, (supra) held that a surety may not be held liable for any greater undertaking than he has agreed to. Minimal fairness test is established by *U.S. v. Figuerola*, 58 F.3d 504. Finally, unilateral mistake test is again, established by *Libby*, (supra).

III.

THE BOND

Nothing in the Bond, in attached Appendix, states that surety was to deliver Roberto Lopez to court, and his breach occurred en route to court. As established in the trial court, had Surety known of danger to Lopez, Surety could have taken him to Court or could have provided security, but Surety also labored in ignorance of the facts, as well as law, totally in the dark.

Forfeiture would be the proper remedy only if the parties agreed to release conditions, as per *U.S. v. Vaccaro*, (supra), and the foregoing release term was clearly not agreed to. Whether the bond is ambiguous when read as a whole, giving a reasonable interpretation to each clause is another test for exoneration, as per *U.S. v. Miller*, (supra), also holding bonds should be construed in favor of the surety. The bond is also defective in only requiring principal, not surety, to be present in court, which surety would have had to be to know of breach and required presence might have attained a copy of notice of jury selection for surety as well as those others mentioned above, as well as principal's transportation to court being ambiguous.

Ambiguities are to be resolved against the drafter is another test, pa per *Timms v. U.S.*, 678 F.2d 831, (9th Cir.),

cert. denied 459 U.S. 1086. Whether bond specifically stated sureties could be held personally liable for amount of bond if conditions for release were violated and bond declared forfeited is another test for exoneration, as per *Vaccaro*, (supra), and *U.S. v. Lujan*, 589 F.2d 436, (9th Cir.), *cert. denied* 442 U.S. 919. Inasmuch as such terms of release as described above were omitted from bond, any ostensible statement that sureties could be held personally liable is mooted through lack of a material element.

Whether deficiencies exist in the bond and whether unilateral mistake that is known or should be known to the other party exists are further tests to exonerate, as per *U.S. v. Figuerola*, (supra). The N.I.C.I. matter, addressed above, clearly comports with this test.

Also, somewhat more extraneous to the bond, but integral to its interpretation to decide on exoneration is possible language difficulty, as per *Figuerola*, (supra). English is surety's second language and he is not so prolific as the government in deciphering bond in question.

Again, we also have possible conflicts among circuits regarding bonds themselves, the Seventh Circuit holding that ambiguities should be resolved against the drafter. But this usual contract law rule is not to be applied when it appears that such is only being accomplished to reach the result one wants, as per *Timms*, (supra), and *Lippo v. Mobil Oil Company*, 776 F.2d 706, (7th Cir.)

Finally, the terms of the bail contract are to be construed strictly in favor of the surety, according to *Miller*, (supra), and this simply was not done in the case at bar.

IV.

ABUSE OF DISCRETION

According to Rule 46 (e)(1-4), 18 U.S.C.A., to reverse a trial court's refusal to set aside or remit, the court must find abuse of discretion. Abuses of discretion are found in acts that are capricious or arbitrary, but not found in acts that are capricious or arbitrary, but not found within a vacuum. Too many mitigating factors were overlooked and too many exacerbating factors' not being present in instant case were overlooked for abuse of discretion not to have occurred. Indeed, no case was located and Petitioner submits none exists in recorded law where forfeiture was allowed to stand and remission not allowed with as many mitigating factors and as few exacerbating factors as in case at bar. Within the totality of circumstances, abuse of discretion occurred.

Sureties establish their burden of proving abuse of discretion, required by *U.S. v. Frias-Ramirez*, (supra), 670 F.2d 849, (9th Cir. 1982); *U.S. v. Parr*, (supra); *U.S. v. Nolan*, 564 F.2d 376, (10th Cir. 1977) and *U.S. v. Foster*, 417 F.2d 1254, (7th Cir. 1969). Also, 62 F.3d 1278, (10th Circuit).

IV.

REMISSION

Petitioner urges that all foregoing arguments regarding exoneration are also applicable as regards remittitur. Further, specific tests have been established for remittitur, some being: (1) if justice does not require forfeiture, as per *U.S. v. Skipper*, 633 F.2d 1177, (Fifth Circuit 1981); (2) if the court abused its discretion or

otherwise, acted in an arbitrary and capricious manner, following general rule that such abuse is not to be found within a vacuum, as per *U.S. v. Roher*, 706 F.2d 725 and *U.S. v. Terrell*, 983 F.2d 653, (5th Cir. 1983), and F.R.Cr.P., Rule 46 (c)(2,4), 18 U.S.C.A.; (3) death of a principal is another relevant factor, as described above; (4) whether a surety is held liable for a greater obligation than he has agreed to, as per *U.S. v. Miller*, 539 F.2d 445, (5th Cir. 1976); (5) whether government is damaged, as per *Roher*, (supra).

Remission in whole or in part would be applicable in the case at bar for the reason that no case was located with so many extenuating factors and so few exacerbating factors where the penalty was so harsh. Justice does not require forfeiture, the court abused its discretion within totality of circumstances, impossibility was presented, though surety exerted as diligent efforts as possible, surety was never notified of hearing, denied Due Process and bond contract is ambiguous as to how principal is to travel to court. Surety was clearly held liable for a greater obligation than he had undertaken, no provision in bond for surety to appear in court so he was not notified, only to be forfeited a huge sum for such denial of Due Process, and government offered no evidence as to how it might have been prejudiced, and the showing above is quite the contrary.

V.

UNCONSTITUTIONALITY

Petitioner reurges that F.R.Cr.P., Rule 46(e), 18 U.S.C.A. is unconstitutional in its failure to require notification of a surety of the setting of original hearing where breach occurred and of a principal's failure to appear. Such denies right to Due Process of Law, as guaranteed by

the Fifth Amendment, denying both liberty and property interests; indeed, often CORE liberty interests, as per line of landmark cases cited below. Fact that huge number of bondsmen throughout the United States are confronted with strict liability in impossible situations where they have exerted every effort constitutes a "special and important reason of general public concern" why the Court should grant certiorari. Also, an important question of law has never been decided and should be decided by this Court, another ground often used for certiorari; that being absolutely no case was located where surety, rather than principal, questioned constitutionality of failure of notice and hearing requirements in Rule 46(e), 18 U.S.C.A.. Some landmark cases establishing liberty and property interests in such businesses as Petitioner's are those that follow:

Board of Regents v. Roth, 408 U.S. 564, *Cleveland Board of Education v. Laudermilk*, 470 U.S. 532, *Perry v. Sindermann*, 408 U.S. 593, *Barry v. Bachi*, 443 U.S. 55, *Delahoussaye v. Seale*, 778 F.2d 1091, and *In re Carter*, 177 F.2d 75, *cert. denied* 338 U.S. 900, all stand for property interests involved and infringed, as stated.

Cruzan v. Director of Missouri Department of Health, 497 U.S. 261, (1990), *Vitek v. Jones*, 455 U.S. 480, *Ingraham v. Wright*, 430 U.S. 651, *San Jacinto Savings and Loan Association v. Kacal*, 928 F.2d 697 (5th Cir. 1991), *Cowan v. Worley*, 814 F.2d 223, (5th Cir. 1987), *Phillips v. Vandygriff*, 711 F.2d 1217, (5th Cir. 1983), and *Paul v. Davis*, 424 U.S. 711, all stand for liberty interests involved and infringed, as stated.

Equal Protection infringement is also, implicit, with such violations as per *Loving v. Virginia*, 388 U.S. 1, *Craig v. Boren*, 429 U.S. 190 (1976), and *Bankers Life v. Crenshaw*, 486 U.S. 71, (1983).

Petitioner seeks the Court's indulgence in behalf of Sixth Amendment rights also having been violated, as well as Fifth Amendment rights, at least, constructively; inasmuch as core liberty interests are at stake in the bail bonding business, as established above.

Petitioner was further denied rights to public trial and notification of nature and cause of accusation, confrontation, compulsory process and assistance of counsel, due to liberty interests, and even core liberty interests, established above.

The foregoing constitutional violations are largely, self evident; however, ineffective assistance is not. It is one thing when a litigant claims he received ineffective assistance, but another when the person assisting him admits ineffective assistance was given, though through no fault of her own, and such assumes the status of a stipulation. Here, ineffective assistance is admitted by the ghostwriter assisting surety now and in the Fifth Circuit, though surety was unrepresented by anyone in the trial court. In other words, though this is surety's LAST CHANCE, it is the first time surety has ever had his day in court.

Ghostwriter admits that while composing Fifth Circuit briefs, she was locked in a locked unit at the Bureau of Prisons on a false charge and had no law library access, and had to use only those somewhat outdated cases, from other circuits, and often, not directly in point that surety could furnish. All efforts to have library books brought to her were thwarted by harassment of a mental patient and her followers who thought the ghostwriter was having "delusions" "that she had been an attorney" in behalf of the girl's con artist boyfriend who claimed he was an attorney who worked in the law library, the girl too dumb to know the difference.

Denial of the ghostwriter's constitutional rights impacted on denial of surety's rights, some matters being highly CURRENT issues before the nation right now, another test for certiorari. Next, an unconstitutional "competency" statute becomes involved, whereby when court appointed attorneys who have clients who are better lawyers than them and won't let them sell them out, use the flip side of ineffective assistance, that being, "inability to assist counsel in one's 'defense', e.g. sell out, one prong of the two pronged "competency" test, such proceedings being a nationwide scandal at enormous taxpayer expense. Other prong of competency statute is equally unconstitutional, that being "having rational understanding of charges against one", has been proven to mean roll over and play dead over charges any half effective attorney could beat, or one is "incompetent", experience teaches. The ghostwriter was even assaulted with crippling drugs during surety's appeal during late Fall of 1994, torturing into confessions no different here than in banana republics. Yet, a fortiorari, the brief itself, proves the ghostwriter's high competence and falsity of their harassment; yet without library access, there is little even the most skilled attorneys can do, and law library access is supposed to be provided penal institutions and was not.

Next, following several extensions, the ghostwriter received brief and appendix documents back, looking like a jigsaw puzzle while in an isolation cell at the Bexar County Jail, which county has been engaged in entire conspiracy since 1975. The ghostwriter was in isolation for smoking in a facility that had gone non smoking. Jails differ from other public buildings that smokers can just leave to smoke and terrorism of anti smoking tyrants and terrorism of blackmarketers when one needs to be working on one's case and 'one fine time to quit smoking against one's will, is denying every constitutional right, forcing smokers all over

the country into pleas to get out and smoke and so doing at huge taxpayer expense from appeals of new "appealable pleas"; while non smokers are not so denied Equal Protection. There was nothing the ghostwriter could do in surety's case from such conditions occurring simultaneously with an April, 1995 appealable plea. Nothing could be more CURRENT than the matter referenced above, inasmuch as the tobacco industry is presently under fire, with present hearings before the Justice Department, and with a matter easily enough resolved by the non smokers simply moving to the next room, smokers are being denied every right' the ghostwriter a member of the R. J. Reynolds family who has offered her experience at attenuating their present problems.

Petitioner had ineffective assistance in the Fifth Circuit for those reasons stated above, and was unrepresented in the trial court. This is surety's last chance to ever have his day in court and Petitioner deserves to be heard for the first time.

VI.

URGING NEW MATTER FOR THE FIRST TIME ON APPEAL:

In its Opinion, the Fifth Circuit references this matter, though seems to waive it somewhat, stating some matters were raised and the issue somewhat irrelevant for other reasons. Should this now present a problem, Petitioner relies on tests set out in cases that follow:

Hernandez v. Alexander, 671 F.2d 402, (5th Cir. 1982)

United States v. Buckalew, 37 F.3d 1134

Unites States v. Fishel, 747 F.2d 271, (5th Cir. 1984)

United States v. Segler, 37 F.3d 526, (5th Cir. 1994)

United States v. Terrell, 983 F.2d 653 (5th Cir. 1983)

"Manifest injustice" resulting is the test of "*Hernandez*", (supra), clearly met in case at bar, a litigant only getting his day in court for the Fist Time when before the United States Supreme Court, due to lack of assistance and other factors related. *Buckalew*, (supra) would allow consideration when errors were made causing trial to be fundamentally unfair, as here, Petitioner not even receiving notice of jury selection. *Fishel*, (supra) would have allowed evidentiary hearing in such instance. Required constitutional claims are involved, so as to hear new matter for the first time on appeal, *Segler*, (supra) also relying on errors yielding fundamental unfairness. *Terrell*, (supra), allows such matters to be raised when grave injustice would otherwise, result.

CONCLUSION

According to *U.S. v. Nolan*, 564 F.2d 376, (10th Cir. 1977), burden of proof in setting aside a forfeiture is on the party seeking relief and Petitioner maintains he has satisfied his burden of proof above and of Record, there being no willfulness of breach, little, if any, prejudice to government and no showing thereof.

According to *Foster*, (supra), what a surety must prove to be exonerated is that injustice was done, as Petitioner has shown above. According to *Lippo v. Mobil Oil Corporation*, 776 F.2d 706, (7th Cir. 1985), contractual language upon which the right of forfeiture is grounded should be strictly construed and if there are two possibilities, only one of which will work a forfeiture, the construction should be adopted that will avoid the forfeiture and preserve

the rights of the parties. Terms of the contract are to be construed in the surety's favor. *Miller*, (supra). Further, circumstances surrounding the contract must be looked to even were bond viable, and Petitioner contends it is not. No case was located anywhere having such severe sanctions, as here, with as many extenuating circumstances and as few exacerbating circumstances. Such caprice, arbitrariness and incongruity existed as to be determinative of abuse of discretion, and Petitioner contends such abuse exists in case at bar. Many "special and important reasons of general public concern" exist in instant case, as addressed above, showing why Certiorari should be granted.

WHEREFORE, PREMISES CONSIDERED, Petitioner prays that Certiorari be granted, that forfeiture be set aside, or at least remission be made in whole or in part as the Court deems just and right.

Respectfully submitted,

Ernesto C. Castaneda
515 Nolana, Suite G
McAllen, Texas 78501

Petitioner, Pro Se

Octavio Castaneda
302 Nolana
McAllen, Texas 78501

Petitioner, Pro Se

APPENDIX A

United States District Court
Southern District of Texas

UNITED STATE OF AMERICA
v.
ROBERTO LOPEZ
Defendant

APPEARANCE BOND

CASE NUMBER: C-94-006-S

xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx

Surety: We, the undersigned, jointly and severally acknowledge that we and out personal representatives jointly and severally are bound to pay to the Unites States of America the $ 100.000.00 CORPORATE SURETY .

xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx

The conditions of this bond are that the defendant: ROBERTO LOPEZ is to appear before this court and at such other places as the defendant may be required to appear in and with any and all orders and directions relating to the defendant's appearance in this case, including appear violation of a condition of defendant's release as may be ordered or notified by this court or any other States District Court to which the defendant may be held to answer or the cause transferred. The defendant to abide by any judgment entered in such matter by surrendering to serve any sentence imposed and any order or direction in connection with such judgment.

It is agreed and understood that this is a continuing bond including any proceeding on appeal or which shall continue until such time as the undersigned are exonerated.

If the defendant appears as ordered or notified and otherwise obeys and performs the foregoing conditions of

this bond then this bond is to be void but if the defendant fails to obey or perform any of these conditions of the amount of this bond shall be due forthwith. Forfeiture of this bond for any breach of its condition be declared by any United States District Court having cognizance of the above entitled matter at the time breach and if the bond is forfeiture and if the forfeiture is not set aside or remitted, judgment may be entered monitored by such United States District Court against each debtor jointly and severally for the amount above together with interest and costs, and execution may be issued and payment secured as provided by the Rules of Criminal Procedure and any other laws of the United States.

This bond is signed on February, 1994 at Laredo, Texas

Defendant Roberto Lopez Address Rt. 2, Box 123CC, Rio Grande City, Texas

Surety International Fidelity Insurance Company
Address 302 Nolana, McAllen, Texas 78502

By /s/ Address: Tel. (210) 631-7000

Signed and acknowledged before me on February , 1994

Approved as to Surety /s/

Michael H. Milby, Clerk

EXHIBIT "A"

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
LAREDO DIVISION

UNITED STATES	§	
OF AMERICA	§	
	§	CRIMINAL NO.
VS.	§	L-94-006-S
	§	
ROBERTO LOPEZ	§	

MOTION FOR JUDGMENT OF DEFAULT OF BOND

NOW COMES the United States of America by and through its United States Attorney in and for the Southern District of Texas, and makes this its Motion for Judgment of Default of Bond of ROBERTO LOPEZ, defendant in the above-captioned case, and as grounds for such motion states as follows:

On February 4, 1994, in Laredo, Texas, in the Laredo Division of this Court, Defendant ROBERTO LOPEZ executed an Appearance Bond for his appearance provided herein, a copy of said bond being attached hereto as Exhibit "A," the defendant having theretofore been admitted to bail in the sum of $100,000.00 secured by the International Fidelity Insurance Company, corporate surety, through Agent Octavio Castaneda.

Thereafter, on January 27, 1994, Notice of Trial Setting was issued by the Court to Defendant ROBERTO LOPEZ and his attorney of record Calixtro Villarreal, at the time of arraignment, for Defendant ROBERTO LOPEZ to appear before this Court in Laredo, Texas on March 16,

1994 at 1:30 p.m. for pre-trial and on March 18, 1994, at 1:30 p.m. for jury selection and trial; that on the dates and time set for the appearance of the defendant and in the course of business of the Court, this Court called the case of the United States of America versus ROBERTO LOPEZ, Criminal Number L-94-006-S, for pre-trial, jury selection and trial, but the defendant failed to appear as notified. Whereupon on motion of the United States of America, this Court declared a forfeiture of the bail of the defendant for such breach of condition of said bond and directed a bench warrant issue for his arrest.

WHEREFORE, the United States of America prays that under the provisions of Rule 46(e)(3), Federal Rules of Criminal Procedure;

(1) that the Court prescribe that notice of this motion be given by mailing a copy of the same to the Defendant, and to the International Fidelity Insurance Company, corporate surety, for a hearing at a date and time fixed by the Court, in accordance with the suggested form of notice filed concurrently herewith;

(2) that the Clerk mail copies of such notice and this motion to the Defendant and to the International Fidelity Insurance Company, corporate surety, after service of the time of the Clerk;

(3) that upon final hearing of this motion, the United States have judgment of default of bond of Defendant ROBERTO LOPEZ and the International Fidelity Insurance Company, corporate surety, for the sum of $100,000.00.

GAYNELLE GRIFFIN JONES
UNITED STATES ATTORNEY

/s/
JOSE ANGEL MORENO
Assistant United States Attorney

EXHIBIT "B"

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion of Judgment of Default of Bond has been mailed to Mr. Roberto Lopez, Rt. 2, Box 123CC, Rio Grande City, Texas 78582; Mr. Calixtro Villarreal, Attorney-at-Law, 205 W. Main, Rio Grande City, Texas 78582; and Mr. Octavio Castaneda, Attorney-In-Fact, International Fidelity Insurance Company, 302 Nolana, McAllen, Texas 78502, by certified mail, on this 23rd day of March, 1994.

/s/
JOSE ANGEL MORENO
Assistant United States Attorney

EXHIBIT "B"

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
LAREDO DIVISION

UNITED STATES OF AMERICA	*	
	*	CRIMINAL NO.
VS.	*	L-94-6
	*	
ROBERTO LOPEZ	*	

JUDGMENT OF DEFAULT

On March 23, 1994, the United States moved for judgment of default on a $100,000.00 surety bond executed by this Defendant on February 4, 1994. The bond was also executed by Octavio Castaneda, as agent for International Fidelity Insurance Company. On March 16, 1994, Defendant failed to appear for final pretrial conference, and he also did not appear for jury selection on March 18, 1994. Whereupon, on motion of the United States of America, this Court declared forfeiture of the bail for the said Roberto Lopez, for such breach of condition of said bond. Such forfeiture was then noted on the docket of the Court and such forfeiture has not been set aside. A hearing on the pending motion on May 20, 1994 was continued at the request of Ernesto Castaneda, allegedly another agent for the bonding company, who represented that he was required to be out-of-town for a medical appointment. The hearing was reset until June 10, 1994. At that time, Octavio Castaneda appeared and requested still more time on the representation that he might be able to surrender the Defendant within 15 days. The Court agreed to postpone entry of this judgment until June 27, 1994. That day has passed and the Defendant

remains a fugitive. Courtroom Deputy Clerk Rosie Rodriguez advises that yesterday Mr. Castaneda appeared personally at her office at a time when the Court was in trial in another case. Mr. Castaneda stated his understanding that the Defendant was dead. However, he produced no documentation of the alleged death and the Court has not otherwise been advised by any official source that the Defendant is indeed dead.

It is therefore ORDERED that the United States of America have judgment of default of bond of Roberto Lopez, principal, and that the United States do have and recover from Roberto Lopez, and the International Fidelity Insurance Company, jointly and severally, the sum of $100,000.00, together with interest to such sum at the rate of 4.22 percent per annum, computed daily and compounded annually until paid in full from date of judgment, and costs of this proceeding.

It is further ORDERED that the United States have execution thereon against the Defendant Roberto Lopez and the International Fidelity Insurance Company, corporate surety, as well as all other writs and process available and necessary to collect the costs of obtaining the judgment.

DONE at Laredo, Texas, this 28th day of June, 1994.

/s/
United States District Judge

EXHIBIT "E"

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
LAREDO DIVISION

UNITED STATES OF AMERICA	*	
	*	CRIMINAL NO.
V.	*	L-94-006-S
	*	
ROBERTO LOPEZ	*	

MOTION TO SET ASIDE FORFEITURE OF BAIL

NOW COMES International Fidelity Insurance Company, through Agent Ernesto Castineda for Agent Octovio Castineda, filing Motion To Set Aside Forfeiture Of Bail opposing the government's Motion For Judgment of Default Of Bond, of ROBERTO LOPEZ, defendant in the above captioned case, and as grounds for such motion, states as follows:

The defendant, ROBERTO LOPEZ, is presently illegally detained by LUIS ALAZAR and others, who kidnapped the defendant on March 16, 1994, at approximately 10:30 A.M., and who are presently holding him claiming that he owes them money. The kidnapping occurred on the pretext of carrying the defendant to Laredo to Court, according to information provided by the family of the defendant. Whereabouts of the defendant are, at present, unknown to defendant's family and to the surety herein, but believed to be in or near Camargo, Mexico. This information was developed by the surety in connection with extensive search for the defendant, who is still being illegally detained by his kidnappers. The act of being kidnapped on

the way to court is not a wilful breach of any of the conditions of the bond, including the requirement of appearance at court for arraignment, etc., as alleged by the government. Moreover, a criminal act against the defendant such as kidnap serves as a mitigating circumstance. Surety shows that it has engaged in activities designed to obtain the defendant's release from his captors by undertaking 24 hour surveillance upon defendant's place of residence, by canvassing and asking his friends and relatives for his whereabouts, and by contacting law enforcement agencies. Surety has gone into Mexico and contacted the Federal Police in Camargo, Mexico, and surety has also contacted the Sheriff of Starr County, Texas. Surety believes that the government will not be inconvenienced because Surety believes that defendant will be rescued from his captors and produced for trial by Surety. Surety also shows that $100,000.00 bond amount was excessive, and seeks remission of $75,000.00 of the bond amount. Surety shows that the cost, inconvenience, and prejudice to the government will be minimal, as Surety will secure the appearance of the defendant at court for his arraignment and trial. Surety shows that this case is on all fours with *Smaldone v. U.S.*, 211 F.2d 161, wherein the defendant was absent not due to his own fault, therein being hospitalized for appendicitis. The key is wilfullness in the failure to appear, such being decidedly more absent in the case of a kidnapped defendant who was attempting to go to his hearing at the time of the kidnapping.

Sureties say that the government's Motion For Judgment Of Default Of Bond should in all ways be denied, asserting, for additional reason, that Sureties were not given notice of the time and date of the hearing the defendant allegedly missed, thus Sureties were prevented from providing security for the defendant to assure his appearance in court and to prevent such a result as a kidnapping which

prevented the defendant from appearing.

WHEREFORE, Sureties, International Fidelity Insurance Company, Octavio Castaneda, Agent, and Ernesto Castaneda, Agent, pray, that under the provisions of Federal Rules Of Criminal Procedure, Rule 46 (e)(2), the government's motion be denied and the Sureties motion be granted since, upon these facts, it does not appear that justice requires the enforcement of the forfeiture.

INTERNATIONAL FIDELITY
INSURANCE COMPANY

Octavio Castaneda, Agent

By /s/
Ernesto Castaneda, Agent

CERTIFICATE OF SERVICE

Ernesto Castaneda certifies hand delivery of a copy of the foregoing to the office of the U.S. Attorney in Laredo, Texas, the 30th day of March, 1994.

/s/
ERNESTO CASTANEDA

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
LAREDO DIVISION

UNITED STATES OF AMERICA	§	
	§	
	§	
VS.	§	
	§	CR. NO.
ROBERTO LOPEZ,	§	L-94-6
PRINCIPAL,	§	
OCTAVIO CASTANEDA,	§	
AGENT &	§	
ERNESTO C. CASTANEDA,	§	
OBLIGOR	§	

NOTICE OF APPEAL
TO THE UNITED STATES COURT OF APPEALS

TO THE HONORABLE JUDGE OF SAID COURT:

Notice is hereby given by OCTAVIO CASTANEDA, Agent and ERNESTO C. CASTANEDA, Obligor, PRO SE, above names appeals to the United States Court of Appeals for the FIFTH CIRCUIT on THE FINAL JUDGMENT OF DEFAULT ORDER on bond forfeiture of the bail of the said ROBERTO LOPEZ, PRINCIPAL was entered in this action on the **28th** of **June, 1994**.

Respectfully submitted,

/s/
ERNESTO C. CASTANEDA, OBLIGOR
PRO SE
302 Nolana
McAllen, TEXAS 78504
(210) 631-7000

Dated this 5th day of July, 1994.

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 94-60475
Summary Calendar

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
versus
ROBERTO LOPEZ,
Defendant,
versus
OCTAVIO CASTANEDA, Agent, and
ERNESTO C. CASTANEDA, Agent of
International Fidelity Insurance Co.,
Movants-Appellants.

Appeal from the United States District Court
for the Southern District of Texas
(94 CR 6 2)

Before JOLLY, JONES, and STEWART, Circuit Judges.

PER CURIAM: *

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

An indictment charged Roberto Lopez with committing three drug offenses. Following his arrest, a $100,000 cash or surety bond was set. Lopez signed a $100,00 corporate surety appearance bond, and agreed in writing to abide by certain prescribed conditions of release. Octavio Castaneda signed the $100,000 appearance bond for Lopez on behalf of the surety, International Fidelity Insurance Company.

Lopez failed to appear at the final pretrial conference. The district court declared him to be a fugitive and issued a bench warrant for his arrest. Thereafter, the government filed a motion for judgment of default on the $100,00 bond, requesting that the court notify the corporate surety of the hearing and to declare a forfeiture of Lopez's bail as a result of his failure to appear.

After receiving notice of the forfeiture hearing, Ernesto Castaneda, acting on behalf of Octavio Castaneda and the surety, filed a motion for a continuance, which the court granted. Ernesto, again on behalf of Octavio and the surety, filed a motion to set aside the forfeiture of the bond. He alleged that, according to Lopez's family, Lopez had been kidnapped while en route to the court on the day of the pretrial conference and that the he was being held captive in Mexico.

At the hearing on the default, Ernesto Castaneda appeared and requested an additional fifteen days in which to return Lopez to the court. Ernesto stated that his investigators had located Lopez in an armed camp in Mexico and that his men would be able to return Lopez to the court within fifteen days. The court granted the continuance and set June 27, 1994, as the date that judgment would be entered. The court explained repeatedly that it would

consider partial remission of the forfeited amount only if Lopez appeared by June 27.

On June 27, 1994, Octavio Castaneda advised the courtroom deputy that it was his understanding that Lopez was dead. He offered no documentation to support his allegation. The court entered a judgment of default the following day.

The movants-appellants, Octavio and Ernesto Castaneda, timely appealed the judgment of forfeiture. Their appeal was dismissed for want of prosecution, but it was later reinstated.

I.

The appellants first argue that they were not given notice of the hearing for the final pretrial conference that Lopez failed to attend. They argue that had they known of the hearing they would have ensured Lopez's safe arrival to the court. They argue that the lack of notice denied their right to due process because it resulted in their loss of property, to wit, the $100,000 surety bond. We are unconvinced.

It is the duty of the surety to advise himself of scheduled appearances, "and the court need not notify them of either the setting, or the principal's failure to appear." *United States v. Roher*, 706 F.2d 725, 727 (5th Cir. 1983). Fed. R. Crim. P. 46(e) requires only notice of a motion for judgment of forfeiture. *Roher*, 706 F.2d at 727. The district court gave notice of the motion as required under Rule 46(e). The court had no other duty of notice to the appellants and, thus, committed no error when it did not advise them of Lopez's pretrial conference date.

II

The appellants next argue that the district court abused its discretion when it refused to set aside or remit the forfeiture. The appellants contend that Lopez failed to appear because he was kidnapped, and that his kidnapping does not constitute a willful breach of the conditions of the bond. They contend that his kidnapping and their numerous efforts to recover him should weigh in favor of setting aside the judgment or at least in remitting a substantial portion of the bond. These arguments are not persuasive.

An accused's release is conditioned upon the execution of a bail bond in order to ensure his presence. 18 U.S.C. § 3146; *United States v. Skipper*, 633 F.2d 1177, 1180 (5th Cir. 1981). When there is a breach of a condition of the bond by the defendant, the court is required to declare a forfeiture of the bail. Fed. R. Crim. P. 46(e)(1). Thereafter, the court may set aside or remit the forfeiture, in whole or in part, if the surety subsequently surrenders the absent defendant into custody or if justice does not require forfeiture. Fed. R. Crim. P. 46(e) (2) & (4). The party moving to set aside the forfeiture bears the burden of proof. *Roher*, 706 F.2d at 727. A district court's refusal to remit part of all of a bond forfeiture is reviewed for an abuse of the court's wide discretion. *United States v. Terrell*, 983 F.2d 653, 656 (5th Cir. 1983).

When Lopez failed to appear for his final pretrial conference, he violated a condition of the bond. The appellants offer nothing more than bare allegations, which in turn are based only on unverified representations from Lopez's family, that he was kidnapped and later died. Their alleged good faith efforts to locate Lopez are irrelevant to the issue before us. As surety for Lopez, the appellants contracted with the court to ensure his appearance. Their

failure to do so, through no fault of the court, does not militate in favor of the appellants. Absent any corroborating documentation of his death, and given that he remains a fugitive, the court's refusal to set aside or remit the forfeiture plainly was not an abuse of its wide discretion. *Skipper*, 633 F.2d at 1180 n.6.

The appellants' reliance upon *Smaldone v. United States*, 211 F.2d 161 (10th Cir. 1954), is misplaced. In *Smaldone*, the defendant entered the hospital under the direction of his physician and was diagnosed with appendicitis. *Id.* at 165. The appellants argue that Smaldone's surgery is less willful than Lopez's kidnapping. In theory, neither illness nor kidnapping are the fault of "will" of the defendant. In *Smaldone*, the defendant's need for medical attention was established with reliable evidence. In contrast, there has been no proof offered to substantiate the allegations of Lopez's kidnapping and death.

Finally, the appellants argue that the $100,000 bond is excessive and seek a $75,000 "remission" of the bond amount. They note that they have incurred sizeable expenses in their good faith efforts to apprehend Lopez.

The government contends that this issue is raised for the first time on appeal and argues that it should not be addressed by this court. Lopez, however, did file a motion before the district court asking that the court reconsider the amount of the bond because allegedly he was unable to satisfy the bond. The court did not rule on the motion. Although the issue may not have been raised for the first time here, there is a serious question whether the issue has been timely raised. *See Skipper*, 633 F.2d at 1179. Nevertheless, even if properly before the court, the issue is without merit. As in *Skipper*, with the aid of hindsight, it is clear that the amount of the bond was actually insufficient to

insure his appearance in court, and thus hardly can be called excessive. *See id.*

IV

For the reasons stated, the judgment of the district court is AFFIRMED.

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-60475
Summary Calendar

D.C. Docket No. 94-CR-6-2

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ROBERTO LOPEZ,

Defendant,

versus

OCTAVIO CASTANEDA, Agent,
and ERNESTO C. CASTANEDA,
Agent of International Fidelity
Insurance Co.,

Movants-Appellants.

Appeal from the United States District Court
for the Southern District of Texas

Before JOLLY, JONES, and STEWART, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the record on appeal and was taken under submission on the briefs on file.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the district court in this cause is affirmed.

September 18, 1995

ISSUED AS MANDATE: **JAN 3 1996**

APPENDIX H

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-60475

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

OCTAVIO CASTANEDA, Agent,
and ERNESTO C. CASTANEDA, Agent
of International Fidelity Insurance Co.,
Defendants-Appellants.

Appeal from the United States
District Court for the
Southern District of Texas

ON PETITION FOR REHEARING
(December 22, 1995)

Before JOLLY, JONES and STEWART, Circuit Judges.

PER CURIAM:

IT IS ORDERED that appellants' motion to file petition for rehearing out of time is GRANTED.

IT IS FURTHER ORDERED that appellant's petition for rehearing filed in the above case is DENIED.

ENTERED FOR THE COURT:

/s/ Grady Jolly
United States Circuit Judge

APPENDIX I

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

Charles R. Fulbruge III
Clerk

TEL. 505-589-4614
600 Camp Street
New Orleans, LA 70130

October 16, 1995

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 94-60475 - USA VS. LOPEZ

(D.C. No. L-94-CR-6-2)

The following action has been taken:

(X) AN EXTENSION OF TIME has been granted to and including

November 2, 1995**

( ) for filing appellant's/petitioner's brief.
( ) for filing appellee's/respondent's brief.
( ) for filing reply brief.
(X) for filing appellant's petition for rehearing.
( )

( ) Enclosed order has been entered.
( ) Motion to consolidate granted.
( ) Motion to supplement or correct the record granted.
( ) Motion for leave to file supplemental brief granted.
( ) Motion for leave to file brief *amicus curiae* granted.

( )
( ) Motion to file bill of costs out of time granted.

( ) Approved bill of costs enclosed.

( ) Motion for leave to file Record Excerpts in excess of 40 pages is granted but subject to reconsideration by the merits panel.

( ) By copy of this letter, the District Court Clerk is requested to return the record and or exhibits.

CHARLES R. FULBRUGE III, Clerk

By: /s/ Donna L. Mendez
Donna L. Mendez
Deputy Clerk

cc: Mr. Ernesto C. Castaneda
Mr. Octovio Castenada ✓
Ms. Alice Ann Burns, AUSA

** MUST BE PHYSICALLY FILED BY DUE DATE.

CERTIFICATE OF SERVICE

On this day 6 day of June, 1996, I, the undersigned, served by certified United States mail, return receipt requested, copy of this Brief and Appendix on Drew S. Days III, Solicitor General of the United States, Solicitor General's Office, United States Department of Justice, Justice Department Building, Washington, D.C. 20543.

Signed this 6 day of June, 1996.

/s/ Ernesto C. Castaneda
Ernesto C. Castaneda
515 Nolana, Suite G.
McAllen, Texas 78501

Petitioner, Pro Se